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IN THE

Supreme Court of the United States

October Term, 1958.

No. 179

THE PENNSYLVANIA RAILROAD COMPANY,
Appellant,

v.

BOROUGH OF SAYREVILLE, et al.,
Appellees.

On Appeal From the Supreme Court of New Jersey.

JURISDICTIONAL STATEMENT.

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INDEX TO JURISDICTIONAL STATEMENT.

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	3
QUESTIONS PRESENTED	3
STATEMENT	4
THE QUESTION PRESENTED IS SUBSTANTIAL	9
CONCLUSION	10

TABLE OF CASES CITED.

	Page
Atchison R. Co. v. Public Utility Commission, 346 U. S. 346, 74 S. Ct. 92, 98 L. Ed. 51 (1953)	2, 7, 8, 10
Borough of Sayreville v. P. R. R. Company, XVI Board of P. U. C. Reports 429 (1938)	4
Erie R. R. Co. v. Public Util. Commrs., 254 U. S. 394, 41 S. Ct. 169, 65 L. Ed. 322 (1921)	6
Nashville, C. & St. L. Ry. v. Walters, 294 U. S. 405, 55 S. Ct. 486, 79 L. Ed. 949 (1935)	6, 7, 9, 10
Standard Oil Co. v. Johnson, 316 U. S. 481, 62 St. Ct. 1168, 86 L. Ed. 1611	2

TABLE OF STATUTES AND AUTHORITIES CITED.

	Page
Act of 1947, L. 1947, c. 178; N. J. S. A. 48:12-61, et seq.	3, 5, 6
Federal Aid Highway Act of 1944, 58 Stat. 838, Sec. 5(b)	9
Rules Governing New Jersey Courts, Rule 4:88-8	2
Title 28 U. S. C., Section 1257(2)	2

TABLE OF CONTENTS OF APPENDIX.

	Page
Exhibit A. Opinion and Judgment of the Supreme Court of New Jersey. Decided February 24, 1958	1a
Exhibit B. Opinion of the Superior Court of New Jersey, Appellate Division. Decided March 8, 1957	26a
Exhibit C. Decision and Order of the Board of Public Utility Commissioners	32a
Exhibit D. Denial of Petition for Reconsideration and Modification	38a
Certificate of Service	39a

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ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

JURISDICTIONAL STATEMENT.

OPINIONS BELOW.

The opinion and judgment of the Supreme Court of New Jersey is reported at 26 N. J. 197, 139 A. 2d 97, copy of which is appended hereto as Exhibit A. The opinion of the Appellate Division of the Superior Court of New Jersey is reported at 44 N. J. Super. 172, 129 A. 2d 895, copy of which is appended hereto as Exhibit B. The decision and order of the Board of Public Utility Commissioners of New Jersey, as yet unreported, are appended hereto as Exhibit C.

JURISDICTION.

The Board of Public Utility Commissioners of New Jersey ordered the appellant to reconstruct a bridge carrying a county road over the railroad right of way in the Borough of Sayreville, New Jersey, and refused to allocate the cost as appellant contended was required by statute. Pursuant to the provisions of Rule 4:88-8 of the Rules Governing New Jersey Courts, the appellant appealed the order to the Appellate Division of the Superior Court of New Jersey. The judgment of the Appellate Division of the Superior Court of New Jersey, affirming the order, was entered on March 8, 1957. The judgment of the Supreme Court of New Jersey affirming the judgment of the Appellate Division was entered on February 24, 1958. Notice of appeal was filed in the Supreme Court of New Jersey on May 19, 1958.

This appeal is brought pursuant to Section 1257(2) of Title 28 U. S. C. which authorizes an appeal to this Court when the final judgment of the highest court of a state upholds the validity of a state statute alleged to be repugnant to the Constitution of the United States. *Standard Oil Co. v. Johnson*, 316 U. S. 481, 62 S. Ct. 1168, 86 L. Ed. 1611; *Atchison R. Co. v. Public Utility Commission*, 346 U. S. 346, 74 S. Ct. 92, 98 L. Ed. 51.

STATUTE INVOLVED.

The statute construed by the New Jersey courts as placing the entire cost of the reconstruction of the bridge upon the railroad is a New Jersey law of 1903 known as the "Railway Act", L. 1903, c. 257; N. J. S. A. 48: 12-49:

> "Every railroad company owning, leasing, or controlling any right of way for a railroad within this state shall construct and keep in repair good and sufficient bridges and passages over, under and across the railroad or right of way where any road, street or avenue now or hereafter laid, shall cross the same, so that public travel on the road is not impeded thereby. Said bridges and passages shall be of such width and character as shall be suitable to the locality in which they are situated."

QUESTIONS PRESENTED.

1. Does a New Jersey statute, governing railroad-highway crossings, which has been construed by the courts of New Jersey as imposing upon a railroad the entire cost of the reconstruction of a crossing as a fixed rule and thus by its terms precludes any determination of a fair and reasonable allocation of costs, deprive the railroad of property without due process of law and constitute an arbitrary and burdensome interference with interstate commerce in violation of the Constitution of the United States?

2. Whether the Supreme Court of New Jersey erred in holding that the statute was not invalid *per se* as a fixed and arbitrary requirement.

3. Whether the Supreme Court of New Jersey erred in holding that the statute was not invalid in its application to the facts of the case as determined by the Public Utility Commission.

STATEMENT.

The New Jersey Board of Public Utility Commissioners ordered the railroad (appellant) to reconstruct a bridge carrying a county road over the railroad right-of-way in the Borough of Sayreville, New Jersey. Exhibit C. The bridge, a steel structure, had been constructed by the railroad in 1901, pursuant to an agreement with a trolley company that was to use it, and had been fully repaired in 1938, pursuant to an order of the Commission in *Borough of Sayreville v. P. R. R. Company*, XVI Board of P. U. C. Reports 429 (1938). Prior bridges had been in existence for many years, possibly since the railroad was built in 1831.

The complaining municipalities contended that the bridge had become unsafe for heavy loads, that it was a fire hazard, and that the railroad was responsible for the curved alignment of the roadway which slowed traffic approaching the bridge. These allegations were denied by the railroad, and were not found as facts by the Commission or made the basis of its order. The Commission found that the bridge was too narrow (18 feet) for the convenient passage of motor buses which had succeeded the trolley line, or for large commercial trucks, and that the curved approaches to the bridge impeded the passage of such vehicles. The maximum permissible width of highway vehicles in New Jersey is eight feet. The Commission, although holding that the railroad had no responsibility for the curved approaches, held that a bridge 30 feet wide would cure the impediment to highway traffic and so ordered. Exhibit C.

In its order, the Commission made no allocation of costs, as had been requested by the railroad, and denied a petition for reconsideration of this point without discussion of the question. Exhibit D. Thereupon the railroad appealed to the Superior Court of New Jersey, Appellate

Division, solely on the issue of cost allocation. The Court construed the New Jersey law as placing the entire cost of reconstructing the bridge on the railroad and held that, so construed, the law was not repugnant to the Constitution of the United States. Exhibit B. The Supreme Court of New Jersey, after certifying an appeal, affirmed by a divided vote. Exhibit A.

In the New Jersey courts, the railroad conceded that it could be required to build a new bridge, and it proceeded to reconstruct the bridge in accordance with the order. It contended, however, that an allocation of costs between the railroad and the state was required by statute and that, if the statute should be construed to preclude any division of costs, the statute was unconstitutional.* In its appeal, the railroad did not question the factual findings of the Commission but accepted the factual findings and conclusions of the Commission as stated in its decision, to wit, that a wider bridge was necessary to facilitate the passage of large vehicles and to permit long trucks and buses to enter the bridge from the curved highway approaches without crossing traffic lines. Thus no factual controversy is involved in this appeal.

The railroad contended that its share of the cost of rebuilding the bridge was limited by law, a question of statutory construction, and that as applied by the Commission, the statute was unconstitutional. The Supreme Court of New Jersey held against appellant on both points. It held that a statute construed to place the entire cost of crossing reconstruction on the railroad was not *per se* arbitrary and unconstitutional, and was not shown to be arbitrary and unreasonable by the facts in this case. Ap-

* By Act of 1947, L. 1947, c. 178; N. J. S. A. 48:12-61, *et seq.*, the New Jersey Crossing Law was amended to provide for an allocation of costs between the railroad and the state, and was supplemented to provide that such allocations "shall apply to all alterations, reconstructions, changes, relocations or openings ordered by the Board of Public Utility Commissioners, after the effective date of this Act". N. J. S. A. 48:12-67.1.

pellant believes that a statute which arbitrarily places the entire burden for rail-highway crossings on the railroad, foreclosing any showing of the circumstances or equities of the situation, is unconstitutional. If this view is untenable, appellant submits that the facts in this case, as determined by the Commission, make the application of the statute unreasonable and unconstitutional.

Prior to the modern development of highways in this country, it was fairly well established in law that full responsibility for the elimination of grade crossings rested upon the railroad. State statutes so provided, like the 1903 Act in New Jersey, N. J. S. A. 49:12-49, quoted above, and they were generally upheld in the courts, as in *Erie R. R. Co. v. Public Util. Commrs.*, 254 U. S. 394, 41 S. Ct. 169, 65 L. Ed. 322 (1921), even though it was hinted, as in that case, 254 U. S. 412, that such statutes were not beyond challenge on constitutional grounds. Subsequent to World War I, however, with the advent of the motor vehicle era, the public attitude changed toward this problem, and it came to be recognized that rail-highway crossings involved more than safety from railroad operation, that motor vehicles rather than railroads were the primary source of danger on the highways, and that the mere presence of a railroad was not the only reason for crossing improvements. *Nashville, C. & St. L. Ry. v. Walters*, 294 U. S. 405, 55 S. Ct. 486, 79 L. Ed. 949 (1935).

Accordingly, State laws have been modified to provide for a fair division of costs between the railroads and the public, and appellant has found no statute still on the books in any other State which, like the 1903 law involved in this case, arbitrarily places the entire burden on the railroad. For most crossing improvements the New Jersey law has likewise been modified, and, as pointed out by the opinions in the Supreme Court of New Jersey, if the bridge in question had resulted in a grade crossing elimination, the cost would have been shared by the State. N. J. S. A. 48:12-62. Even more significant, the reconstruc-

tion of this bridge, as ordered by the Commission, would have been subject to cost allocation if it had carried a State highway. Only with respect to the reconstruction of bridges on secondary roads did the New Jersey courts find a gap in the pattern of modern statutory regulation, bringing into play the fixed and arbitrary obligation of the 1903 statute.

Appellant does not contend that circumstances can never exist which would make it fair and reasonable to place the entire cost of a crossing improvement upon a railroad. Its argument is that a fixed rule which permits no consideration of what is fair and reasonable but which instead arbitrarily imposes the entire cost in every case upon the railroad is unconstitutional. The principle that there must be a fair and reasonable allocation of costs was laid down by this Court in *Nashville, C. & St. L. Ry. v. Walters, supra,* and reaffirmed in *Atchison R. Co. v. Public Utility Commission,* 346 U. S. 346, 74 S. Ct. 92, 98 L. Ed. 51 (1953).

In the *Nashville* case the statute involved authorized the State Commission to require the separation of grades if it determined that the elimination of grade crossings was necessary for safety purposes and, without giving the Commission any discretion as to the proportion of the cost to be borne by the railroad, required that the railroad in every case pay one-half of the total cost of the separation of grades. Acting under the authority of this statute the state agency required a railroad to pay one-half of the cost of an underpass necessary at a point where a proposed state highway crossed the main line of a railroad. This Court held that the Supreme Court of Tennessee had erred in not considering whether on the particular facts involved in that case the imposition of 50% of the costs on the railroad was arbitrary and unreasonable. In the instant case the statute, as construed by the New Jersey courts, is even more arbitrary in its application than was the Tennessee statute. Here the statute requires the New Jersey Com-

mission to impose the entire cost upon the railroad in a situation in which no question of highway safety is involved. The New Jersey Commission did not find that the existing bridge was unsafe in any respect but only that it restricted the movement of highway vehicles because of its limited width and because the curved approaches, which were held to be not the responsibility of the railroad, created an undesirable condition (Exhibit C). The change ordered here was simply a change designed to improve the highway so that it could be more conveniently used by competing forms of traffic.

In *Atchison R. Co. v. Public Utility Commission*, 346 U. S. 346, the State commission, acting pursuant to the provisions of the statute which authorized it to allocate the costs of separating, relocating and improving crossings, allocated against the railroad 50% of the cost of a crossing reconstruction and of the cost of replacing a grade crossing by an underpass. The railroad attacked the application of the statute on the ground that the cost of the improvements should have been allocated solely on the basis of the benefits, if any, which they conferred on the railroad. This Court rejected that contention, holding that in the circumstances the allocations were fair and reasonable. In its opinion, however, the Court said (346 U. S. at p. 352):

> "There is the proper limitation that such allocation of costs must be fair and reasonable."

Unlike the California statute the New Jersey statute, as construed below, provides for no allocation and permits of no exercise of discretion by the Commission, but imposes a fixed and arbitrary rule that the entire cost of the improvement must be borne by the railroad. As so construed the statute lacks the "proper limitation" held by this Court to be essential to constitutionality.

THE QUESTION PRESENTED IS SUBSTANTIAL.

Since the *Nashville* case state laws throughout the country have been revised in recognition of the fact that as a result of changed conditions the relocation, reconstruction and improvement of rail-highway crossings can no longer be viewed as directed solely to safety considerations incident to the operation of the railroads. As has been pointed out above New Jersey law is no exception; under the statutes of New Jersey, railroads are no longer required to bear the entire cost of the elimination of grade crossings in that state. In the instant case, however, the New Jersey courts have construed a New Jersey statute as imposing upon the railroads the rigid and absolute requirement that they assume the entire cost of reconstructing an existing bridge or overpass. The bridge involved was originally constructed to meet the requirements of a trolley line which paid part of the cost but has now become inconvenient for buses which use the bridge as a public highway. The effect of the decision below is to place upon the railroad the sole financial responsibility for keeping highway conditions convenient for competitive forms of transportation even when no question of safety vis-a-vis the railroad is involved.

Both national and state statutes recognize that a railroad's obligation should be limited, and should be determined in the light of facts relating to the individual improvement. Under Federal law, which governs much crossing work in New Jersey and in all of the states, the extent to which the railroad must constribute to the expense of a crossing improvement is determined separately for each location on the basis of the conditions at the particular crossing. In any event, the maximum contribution of the railroad to a crossing improvement governed by the Federal law is limited to 10% of the total cost of the improvement. *Federal Aid Highway Act of 1944*, 58 Stat. 838,

Sec. 5(b). In substantially all of the states, the railroad obligation with respect to crossing changes is either limited by statute or determined by the regulatory commission, subject to the "fair and reasonable" requirements of *Atchison R. Co. v. Public Utility Commission, supra.* The decision below is a step backward, which can, if the principle is upheld, affect a multitude of situations, and thus presents a substantial question.

This Court has in the past recognized the importance of the constitutional questions invoived in the allocation of the cost of eliminating railroad grade crossings. *Nashville, C. & St. L. Ry. v. Walters,* 294 U. S. 405, *Atchison R. Co. v. Public Utility Commission,* 346 U. S. 346. The related problem of financial responsibility for the improvement of existing separated crossings so that they may conform to modern highway developments is of importance both to the railroads and to the states. The decision below, which conflicts with the principles heretofore announced and applied by this Court, therefore raises a substantial question of constitutional law which is of great practical importance.

CONCLUSION.

For the reasons stated herein, the question presented by this appeal is substantial, and it is respectfully submitted that probable jurisdiction should be noted.

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Appendix.

EXHIBIT A.

Opinion and Judgment of the Supreme Court of New Jersey.

Decided February 24, 1958.

WEINTRAUB, *C. J.*

On July 25, 1956 the Board of Public Utility Commissioners ordered appellant railroad to reconstruct a bridge over its right-of-way in the Borough of Sayreville at the railroad's cost. The estimated cost is $110,000. The railroad conceived that under L.1947, c. 178 (N.J.S.A. 48:12-67.1) it should pay but 15% of the cost and the Board the balance. It petitioned the Board to modify the order accordingly, and from a denial it appealed. The Appellate Division affirmed, 44 N.J.Super. 172, 129 A.2d 895 (1957), and we granted certification. 24 N.J. 222, 131 A.2d 586 (1957).

The Appellate Division held that with respect to public highways other than state highways the 1947 statute authorizes a division of cost only for the elimination of an existing crossing at grade and leaves unaffected the pre-existing responsibility of the railroad under R.S. 48:12-49, N.J.S.A. to bear the entire cost of the work where the crossing is not at grade.

The existing bridge erected by the railroad in 1901 carries a county highway over the railroad right-of-way. The bridge is narrow and is now a bottleneck. The improvement here involved is necessary to meet local transportation needs reflecting the growth of the community.

The issue before the Board was one of statutory interpretation. Before the Appellate Division, the railroad

added a constitutional challenge. The Appellate Division understood the added issue to be whether the railroad's liability must be confined to the amount of the benefit which the improvement would confer upon the railroad. It held that the cost need not be allocated on the basis of benefits, and that where the improvement is required to meet local transportation needs and further safety and convenience made necessary by the growth of the community, the entire cost may be assessed upon the railroad. Atchison, Topeka & Sante Fe Railway Co. v. Public Utilities Commission, 346 U.S. 346, 74 S.Ct. 92, 98 L.Ed. 51 (1953).

Appellant does not quarrel with the stated conclusion of the Appellate Division, but rather says the constitutional issue it proffered was that since in some circumstances the State may not saddle the entire cost upon a railroad, Nashville, Chattanooga, & St. Louis Railway Co. v. Walters, 294 U.S. 405, 55 S.Ct. 486, 79 L.Ed. 949 (1935), our statute, R.S. 48:12-49, N.J.S.A., must fall because it would authorize unconstitutional action in such other situations. The rule appellant would invoke, that the validity of a statute will be judged by what may be done under it, has been applied sparingly, and largely to penal measures. 2 Sutherland, Statutory Construction (3d ed., 1943), §§ 2413-19, pp. 190-98; 11 Am.Jur., Constitutional Law, § 164, p. 858. The Legislature cannot always anticipate the constitutional formula which may be judicially devised and perhaps revised with changing circumstances. There is no reason to insist upon perfect anticipation. If a statute is reasonably appropriate in its overall approach, it should be upheld notwithstanding it may be invalid in special circumstances, when it is apparent that the Legislature would want the act to prevail where constitutionally it may. Such surely is the case here. In Nashville it was observed with respect to the very area here involved that "A statute valid as to one set of facts may be invalid as to another" (294 U.S., at page 415, 55 S.Ct. at page 488). Since appellant does not claim, and surely has not demonstrated, that the act is invalid in

its application to the facts of this case, the constitutional challenge must fail.

We proceed to the question whether the Appellate Division correctly construed the 1947 statute to be inapplicable where the grade-crossing elimination had theretofore been accomplished. It is argued that it is absurd to distinguish between the cost of eliminating existing grade-crossings, and the cost of replacing a prior elimination. We do not believe this is so. We agree with the Appellate Division that the 1947 statute was intended to foster elimination of existing grade crossings; that the Legislature was willing that the state share in the cost of combatting existing hazards at grade, but did not intend it to assume any part of the railroads' burden as to eliminations already accomplished. A decision to confine the expenditure of state moneys to the removal of still existing grade crossings cannot be said to be capricious or arbitrary.

Surely that "classification" is not arbitrary in any constitutional sense, and if it were, the 1947 statute would fall, leaving the railroads with their pre-existing liability. Such arbitrariness, if it were a fact, would not warrant a judicial extension of the statute beyond the legislative will. Whether the State ought to absorb 85% of the cost of remodeling or replacing structures heretofore erected to eliminate grade crossings is wholly a matter of policy which must be left to the other branches of government. We can properly concern ourselves only with the question whether the Legislature has so decided.

A review of the legislative history cogently supports the judgment of the Appellate Division. (Italics in quotations herein are added.)

It is not disputed that initially under the statutory scheme the railroads held the entire burden with respect to eliminations. R.S. 48:12-49, N.J.S.A. In 1913 the Fielder Act (c. 57) was adopted vesting the Board of Public Utility Commissioners with jurisdiction to order eliminations. Section 1 (in its later form it is R.S. 48:12-61, N.J.S.A.)

provided that "Whenever a public highway and a railroad *cross each other at the same level* and it shall appear to the board that such crossing is dangerous to public safety, or that the public travel on such highway is impeded thereby," the Board may order the railroad company "to alter such crossing, or crossings, according to plans to be approved by said board, by substituting therefor a crossing or crossings, not at the grade of such public highway either by carrying such public highway under or over such railroad, or railroads, *or by reconstructing such railroad, or railroads, under or over such public highway*, or by vacating, relocating or changing the lines, width, direction or location of such highway and the opening of a new highway in the place of the one ordered vacated." Section 2 (in its later form R.S. 48:12-62, N.J.S.A.) provided "The entire expense of such alterations, changes, relocation or opening" shall be paid by the railroad, with certain provisos not here pertinent.

The observations should be made with respect to the Fielder Act. (1) The act dealt solely with eliminations of *existing crossings at grade*. (2) The word "reconstructing," italicized in the quotation in the preceding paragraph, related solely to reconstruction of a railroad as part of a plan for elimination of *an existing crossing at grade*. It did not refer to the reconstruction of a bridge by which a grade crossing had already been eliminated.

The first departure from the policy of imposing the total cost upon railroads occurred in 1929 when chapter 88 was adopted, whereby in section 1 the State Highway Commission was required "to formulate a program for the elimination of railroad *crossings at grade on State highways*, the improvement, relocation and *reconstruction of crossings of railroads and State highways not at grade*, and the location and construction of new *crossings* of railroads and State highways *not at grade* * * *." (R.S. 48:12-68, N.J.S.A.). Section 3 provided "The cost of the work shall be borne by the State and the railroad company involved in equal shares." (See R.S. 48:12-70, 71 N.J.S.A.).

This statute applied only to crossings on state highways and hence is not applicable to the present case. Its provisions, however, are noted because of their bearing upon the construction of the 1947 statute.

In 1930, the Fielder Act was amended by chapter 101. Section 1 of the Fielder Act was thereby amended to delete crossings on state highways (because of the 1929 statute noted immediately above). Section 2 was amended to provide that the cost "shall be paid fifty per centum by such railroad company • • • and fifty per centum by said board out of funds to be provided for that purpose."

There can be no doubt that the 50-50 program this inaugurated in 1930 related solely to elimination of *crossings at grade*. The language of section 1 of the Fielder Act quoted hereinabove remained unaltered (except for the exclusion of state highways) and "reconstructing such railroad" remained merely one of the methods for eliminating an existing crossing at grade. Contemporaneous legislation to provide funds for sharing the cost of the eliminations under the 1929 and 1930 acts emphasizes that this is so. Section 8(a) of chapter 102 of the Laws of 1930 provided for the distribution of $2,000,000 per year from the receipts of motor fuel taxation "To the Board of Public Utility Commissioners • • • to be used by it to defray the public share of the cost of *eliminating grade crossings*" under the 1930 amendment of the Fielder Act. It was provided that such funds shall not be furnished the board "on account of the cost of *eliminating such grade crossings* in any year in which funds for such purpose shall be available in the 'Grade Crossing Elimination Fund' provided for by an act pending at this session." The pending act thus referred to was enacted as chapter 228. It authorized the issuance of bonds and to the extent here pertinent the reference is to "the cost of *eliminating railroad grade crossings* on highways other than State highways." (sec. 1).

In the Report to the Legislature of the Commission Created by Concurrent Resolution of April 17, 1929, which

recommended the 1930 amendments of the Fielder Act and Fuel Tax Act, the entire emphasis is upon the need to eliminate existing grade crossings. At page 4 it was stated that "the danger at highway grade crossings is constantly increasing as the use of the highways by motor vehicles increases," and at page 8 the report reads:

> "* * * *It is good policy to eliminate the dangerous grade crossings as fast as possible,* and while it might be desirable to provide larger sums for that purpose, if they could be found, there are certain practical considerations which govern our conclusions; namely, under Chapter 88, the Highway Department is directed to prepare and carry out an annual program relative to crossings of state highways over railroads involving the expenditure of two million dollars on behalf of the State and a like amount on behalf of the railroads. The necessity of avoiding unnecessary interference with the flow of traffic on both the highways and railroads, and the practical limitations which govern the progress of construction work of that character, have influenced our conclusion that if another two million dollars is provided for the elimination of grade crossings on municipal and county highways and the requirement of a like amount to be expended by the railroad companies for that purpose, we will then have in effect grade crossing programs aggregating eight million dollars per year, half of which is to be provided by the State and the other half by the railroad companies. We believe that this amount is as large as either the State or the railroads can consistently provide. Such an annual program would certainly carry forward the progress of grade crossing elimination at a much greater rate than has ever occurred in the past."

The statement of purpose attached to the bill which introduced the 50-50 formula into the Fielder Act accordingly reads:

> "The purpose of this act is *to expedite the elimination of dangerous grade crossings* by applying to crossings, other than State highways, the same division of expense between the public and railroad companies as was provided by Chapter 88, Laws of 1929 (p. 138), with respect to crossings on State highways."

The statement of purpose accompanying the bill which became the 1930 amendment of the Fuel Tax Act, referred to above, reads:

> "The purpose of this act is to provide funds to pay for the public share of the cost of *eliminating grade crossings* on highways other than State highways under the Fielder Act (Chapter 57, Laws of 1913, p. 91) as amended by a companion bill introduced at this session of the Legislature."

In 1935, the Fuel Tax Act was repealed and a new measure enacted as chapter 319. There was continued therein in section 1302 the same provision distributing a portion of the proceeds to the board "to be used by it to defray the public share of the cost of *eliminating grade crossings*" under the Fielder Act as amended in 1930.

Thus it is perfectly clear that if the present controversy had arisen after 1930 but before the 1947 statute, the railroad could not have looked to public funds for any part of the cost.

We come, accordingly, to chapter 178 of the Laws of 1947. Its purpose was to alter the formula for allocating the cost from an equal division to 85% and 15%. We cannot find a trace of an intention to extend the public role from the limited area of accomplishing further elimination of existing grade crossings, to the assumption of responsibility with respect to past eliminations.

Section 1 of the 1947 act amends section 2 of the Fielder Act to replace the 50-50 formula with the 85-15 division. It inserted the word "reconstructions" in that section in the

phrase "such alterations, *reconstructions,* changes, relocation or opening." What is the meaning of "such * * * reconstructions"? The words can refer only to the *reconstructing of a railroad as part of a plan to eliminate an existing grade crossing* under section 1 of the Fielder Act. There is nothing else to which it could refer. We suppose "reconstructions" was inserted to avoid any possible contention that the 85-15 formula would be inapplicable because "alterations, changes, relocation or opening" might otherwise not embrace the cost of reconstructing a railroad where the grade crossing elimination plan calls for that work. At any rate, "such * * * reconstructions" can refer only to the reconstruction of a railroad, as already stated.

Appellant seeks support in section 2 of the 1947 act. It provides that:

> "Sections 48:12-61 to 48:12-66 [The Fielder Act] * * * shall apply to *all* alterations, *reconstructions,* changes, relocations or openings ordered by the Board of Public Utility Commissioners, after the effective date of this act, and also to *any* alterations, *reconstructions,* changes, relocations or openings ordered prior to such effective date, if no part of the work under such order had been actally commenced on the ground prior to such date. * * *"

The railroad attributes great significance to "all * * * reconstructions." We find none. The role of section 2 was merely to spell out the effective date of the new 85-15 formula and nothing more. To that end it made the formula effective as to *all* new projects and extended it as well to *any* theretofore ordered if the work had not been commenced on the ground. We cannot conceive of any adjectives other than "all" and "any" which would more clearly express that purpose. And the word "reconstructions," in that *time* provision, can only refer back to "reconstructions" in section 1 of the 1947 act, which, as already pointed

out, refers in turn to reconstruction of a railroad as part of an elimination plan. It would, of course, be remarkable to conclude that "reconstructions" in section 2 of the 1947 act means something other than "reconstructions" in section 1 of the same act. We add that the 1930 amendment introducing the 50-50 arrangement likewise had a *time* provision to designate the projects covered by that amendment (sec. 5; see R.S. 48:12-67, N.J.S.A.), which provision essentially parallels section 2 of the 1947 statute.

Nor can we find anything in the title of the 1947 act to support appellant's view. The title, of course, could not enlarge the operative provisions of the statute, and would be helpful only if there were some ambiguity therein, and we find none. At any rate, the title reveals nothing significant. It reads:

> "An act concerning the elimination of *grade and other crossings* of railroad tracks and highways, amending sections 48:12-62, 48:12-70, 48:12-71, and 48:12-77 and *supplementing* chapter twelve of Title 48 of the Revised Statutes."

Stress is placed upon "other crossings" to support the view that the amendments already described above must go beyond elimination of existing *grade crossings.* The answer is simply this. The *state highway* crossing statute of 1929 (it was amended by chapter 234 of the Laws of 1931 in respects not here pertinent) provided for 50-50 division of the cost of "the elimination of railroad crossings *at grade* on State highways, and for the improvement, relocation and *reconstruction of crossings of railroads and State highways not at grade,* and the location and construction of new crossings of railroads and State highways *not at grade.*" Thus, as to state highways, the 50-50 program of 1929 included *crossings not at grade,* whereas the 50-50 program under the 1930 amendment of the Fielder Act did not. Since the 1947 statute introduced the 85-15 formula into both situa-

tions and section 4 (applicable to state highways) speaks accordingly of "the elimination of any crossing *at grade* or the improvement, relocation, alteration or reconstruction of any crossing *not at grade* on any State highway", the draftsman included "other crossings" in the title to cover the amendment of the 1929 state highway statute. The reference to "other crossings" in the title of the 1947 act therefore cannot be said to be imperatively applicable to the amendments therein of the Fielder Act.

Nor does the word "supplementing" in the title add anything. The word probably was used because the act introduced the 85-15 division not only as to future transactions but also retroactively as to projects not yet actually started on the ground, and hence the draftsman conceived the act was more than a mere amendment. Whatever the reason, it cannot alter the meaning of the operative provisions of the act.

Nor can any direction be found in the statement of purpose which accompanied the bill which became the 1947 act. It is equally expressive of the purpose to enlarge the formula for distribution of costs. It could not enlarge the operative provisions of the body of the act.

The matter of funds is the clinching consideration. The only moneys at any time appropriated are the receipts from the motor fuel tax and from the bond issue referred to above. In express terms, those moneys are available only for *elimination of existing grade crossings* (except as to state highways). Thus, the appellant's position would lead to an incongruous result; it would presently relieve the railroads of any burden as to replacements unless 85% of the cost is furnished by the Board even though the Legislature did not arrange for revenue for that purpose. When in 1930 it decided the public should assume 50% of the cost of elimination of grade crossings, it made provision to implement the program. It made no further provision in 1947 for the reason that it did not thereby intend to assume responsibility in the new area. It would be startling to

conclude the Legislature relieved the railroads of any obligation to go forward until such time, if ever, as public funds should be appropriated. We should not attribute that improvident course to the legislative branch. Indeed, appellant's position would require the conclusion that the order in question was wholly beyond the authority of the Board, because the Board is empowered to incur its share of the cost only out of funds provided for that purpose, and no funds have been provided. The Board has no power to commit the State except as to moneys appropriated.

Extended discussion can complicate a relatively simple situation. We would ask this question: Can it fairly be said that any legislator reading the 1947 bill would have understood that by virtue of "reconstructions," "all," "any," and "other crossings" and "supplementing" in the title, a policy of cost-sharing which had been limited to elimination of existing crossings was thereby expanded to embrace replacements of structures relating to past eliminations? We cannot believe that any legislator so understood. Before we conclude that a private liability was transmuted into a public one, doubtless involving a potential of millions of dollars, the purpose so to do should be crystal clear. It should not depend upon intricate interpretation. The ease with which that intention could have been plainly expressed is apparent.

The judgment of the Appellate Division is accordingly affirmed.

For affirmance: Chief Justice WEINTRAUB and Justices BURLING, JACOBS and PROCTOR—4.

For reversal: Justices HEHER, WACHENFELD and FRANCIS—3.

HEHER, J. (dissenting).

As the CHIEF JUSTICE says, the basic inquiry here has to do with the meaning of L.1947, c. 178, entitled "An Act concerning the elimination of grade and other crossings of railroad tracks and highways, amending sections 48:12-62, 48:12-70, 48:12-71, 48:12-77 and supplementing chapter twelve of Title 48 of the Revised Statutes."

The immediate question is whether the cost of constructing a new fireproof bridge to replace the existing "Deep Cut Bridge" built in 1831 or thereabouts over the railroad's right of way across Washington Road in Sayreville, and reconstructed in 1901, is apportionable at the rate of 85% to the State and 15% to the railroad. The railroad concedes the public need for the new structure; the contention is that the cited act of 1947 provides for the sharing of the expense of the improvement at the given ratio of 85%-15%, and if L.1903, c. 257, R.S. 48:12-49, N.J.S.A. has not been thereby overridden in this regard, and the entire burden is laid upon it, then the statute is unconstitutional as declaring "a fixed and arbitrary rule, which permits no consideration of what is fair and reasonable, or of any judgment whatsoever," citing Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405, 55 S.Ct. 486, 79 L.Ed. 949 (1935), and Atchison, Topeka & Santa Fe R. Co. v. Public Utilities Commission, 346 U.S. 346, 74 S.Ct. 92, 98 L.Ed. 51 (1953).

And the finding of my colleagues is that the "existing bridge erected in 1901 * * * is narrow and is now a bottleneck," and the "improvement here involved is necessary to meet local transportation needs reflecting the growth of the community," just as much so as the 1901 bridge served the needs of that day; but that the 1947 statute "was intended to foster elimination of existing grade crossings; that the Legislature was willing that the State share in the cost of combatting existing hazards at grade, but did not intend it to assume any part of the railroads' burden as to eliminations already accomplished," although the cost of alterations and reconstruction of State highway-road crossings not at grade is to be shared according to the 85%-15% ratio, and a "decision to confine the expenditure of the State moneys to the removal of still existing grade crossings cannot be said to be capricious or arbitrary."

Construction will be aided by a review of the statutes in historical perspective. L.1903, c. 257, § 26, R.S. 48:12-49, N.J.S.A., known as the "Railway Act," laid upon every

railroad the duty, at its own expense, to "construct and keep in repair" good and sufficient bridges and passages over, under and across the railroad or right of way where any road or street then or thereafter established shall cross the same, so that public travel on the road is not impeded. The bridges and passages were required to be "of such width and character as shall be suitable to the locality in which they are situated." As just said, it was under the presumed authority of this act that the railroad here has been assessed the expense of the proposed Sayreville bridge.

This statute was followed by L.1913, c. 57, the "Fielder Grade Crossing Law," which empowered the then recently created Board of Public Utility Commissioners to eliminate railroad-highway grade crossings that had elements of danger to public safety or impeded traffic. The railroad was chargeable with the entire cost of "such alterations, changes, relocation or opening, including damages to adjacent property," save that a street railway using the crossing could be assessed not more than 10% of the expense directly chargeable to the crossing.

Later on, by L.1930, c. 101, now R.S. 48:12-61 et seq., N.J.S.A. the act was amended, section 1, to limit its operation to public highways other than state highways in accord with a recently enacted statute, L.1929, c. 88, R.S. 48:12-68 et seq., N.J.S.A., placing within the jurisdiction of the State Highway Commission the "elimination of railroad crossings at grade on State highways, the improvement, relocation and reconstruction of crossings of railroad and State highways not at grade, and the location and construction of new crossings of railroads and State highways not at grade," the cost of the work to be borne by the State and the railroad in equal shares. By section 2 of the 1930 Act, R.S. 48:12-62, N.J.S.A., the expense of the grade separation was laid equally upon the State and the railroad.

The 1930 act, as amended by L.1931, c. 29, R.S. 48:12-61, N.J.S.A., authorized the Board to order the railroad to "alter" such grade crossing involving "a public

highway, other than a State highway," the "alterations" to be made (a) "by substituting" a crossing not at grade "by carrying such public highway under or over such railroad" or by "reconstructing" the railroad "under or over such public highway"; or (b) by vacating, relocating or changing the lines, width, direction or location of such highway "and the opening of a new highway in the place of the one vacated"; or (c) by relocating the tracks of the railroad where the elimination of the crossing would "unduly injure" the owners of property. And the provision for the equal division of the expense remained as it was, covering "such alterations, changes, relocation or opening, including damages to adjacent property" and the cost of removing, relaying or relocating municipal pipes, conduits and subways.

It is said in argument that the "important thing to note about the Fielder Law is that since its inception it has applied only to the *elimination* of grade crossings"; that this act, R.S. 48:12-61 et seq., N.J.S.A. "is in Article 12 of Title 48, as contrasted with R.S. 48:12-49 which is found in Article 11," and that the "primary purpose" of the 1947 act "was to change cost allocation from 50% to 85% under the Fielder Grade Crossing Law and the State highway crossing law." But this classification would seem to be at variance with the outstanding principle and policy of the statute, to apportion such burdens more in keeping with the socio-economic needs and interests attending the great expansion and development of motor vehicle transportation of passengers and freight in our rapidly growing communities, not at all comparable to the demands of an earlier and simpler society, so much so that the railroad, no longer the prime source of danger, is itself in need of protection from the hazards of motor transportation, not to mention the changed economic factors in this highly competitive field. See Nashville, C. & St. L. R. Co. v. Walters, supra. There has long been evidence of ever-increasing financial stress of railroads from the competition of modern transportation

facilities by land and air. The motor and air era has revolutionized transportation. Also, the avoidance of traffic interruptions is a major service to highway users; and grade separations, even on secondary roads, are now deemed a significant public service that may well be regarded in assessing the relative benefits of the improvements for a fair and just allocation of the cost as between the State and the railroad, none of which is borne directly by the commercial users of the highway. It goes without saying that an individual's share of the cost of advancing the public convenience must bear some rational relation to the evils to be eradicated or the advantages to be had. Nashville, supra. We live and have our being in an era of constant adjustment to changing social and economic concepts related to essential public needs and conveniences; and the 1947 act is but a legislative assessment of the relative responsibilities of the State and the railroads in the vital field of transportation and traffic regulation and security for the common good and welfare, such as is now accorded general recognition in the federal and many of the state jurisdictions. See Federal Highway (Aid) Act, 23 U.S.C.A., sections 1-25.

Indeed, the introducer of the Senate Bill which became the act of 1947 affirmed in the appended explanatory statement that the purpose of the measure was "to bring the grade crossing elimination laws of New Jersey more nearly in line with the Federal-Aid Highway Act of 1944 and the grade crossing elimination laws in certain other States," and "[i]t will also progress the elimination of hazards of highway-railroad crossings at grade and reduce the impediments to highway traffic, occasioned by such crossings, in advancement of the recommendations contained in the 35th Annual Report of the Board of Public Utility Commissioners."

The then current policy of other state jurisdictions was to bring the reconstruction of existing grade separations within the cost apportionment ratio. For example: Ohio,

Page's Rev.Code Ann., sec. 4957.01; Indiana, Burns' Stat. Ann., sec. 55-1810; Michigan, Stat.Ann., sec. 9.1141; West Virginia, Code Ann., sec., 1465(9), 1470(14), 1473(1), (17a).

And the Federal Highway (Aid) Act, sections 2, 6, supra, covers the construction and reconstruction of "primary or interstate" and "secondary or intercounty" highways; and the term "highway" includes "bridges" and "tunnels."

Our act of 1947 is not entitled "An Act to amend * * *" a given statute by title or numerical designation, but rather "An Act concerning the elimination of grade and other crossings of railroad tracks and highways, amending "the stated sections 48:12-62, 48:12-70, 48:12-71 and 48:12-77 "and supplementing" chapter 12 of the Revised Statutes. Thus, the title reveals a legislative design to regulate, not alone the elimination of grade crossings but "other crossings of railroad tracks and highways" as well, and to supplement the coverage of chapter 12 of the Revised Statutes. And the regulatory provisions of the act are quite clearly directed to that end.

By sections 3, 4 and 5 of the act, R.S. 48:12-70, 48:12-71 and 48:12-77, N.J.S.A. were amended to provide for sharing the cost, R.S. 48:12-68, N.J.S.A., of eliminating state highway-railroad grade crossings, and the improvement, relocation, alteration and reconstruction of such crossings not at grade, and the location and construction of new crossings of railroads and state highways not at grade where such construction will replace an existing grade crossing there or in the vicinity, according to the stated 85%-15% ratio rather than by an equal division of the burden.

Section 1 of the 1947 act amended R.S. 48:12-62, N.J.S.A., the Fielder Law, to prescribe the very same ratio of 85%-15% in sharing the expense of "such alterations, reconstructions, changes, relocation or opening," of grade crossings not involving state highways, permissible under R.S. 48:12-61, N.J.S.A., omitting a preexisting proviso

allowing the use of allotted government aid in reduction of the railroad's share. Here, for the first time, the word "reconstructions" was inserted between "alterations" and "changes" even though there had been no controversy over the years as to the meaning of the clause.

And the significance of the added term was accentuated by the succeeding section 2 of the 1947 act, which is not in form an amendment of the preexisting statute but a supplement to chapter 12, providing that "Sections 48:12-61 to 48:12-66 (the Fielder Law) * * * shall apply to all alterations, reconstructions, changes, reloactions or openings ordered" by the Utility Commissioners, "*after the effective date of this act*, and *also* to any alterations, reconstructions, changes, relocations or openings ordered prior to such effective date," if no part of the work so ordered had been "actually commenced on the ground prior to such date." And "No further application" to the Board "shall be necessary in any proceedings in which an order of the board has been made prior to the effective date of this act *to bring the alterations, reconstructions, changes, relocations or openings, so ordered, within the provisions of said sections 48:12-61 to 48:12-66 of this Title.*" [Emphasis supplied.] The section was then made inapplicable to "any grade crossing elimination under a State Highway Commission program, pursuant to the provisions of sections 48:12-68 to 48:12-77 of this Title."

And so, the measure is not an amendment of but rather a supplement to the Fielder Law, comprised in chapter 12 of the Revised Statutes as subdivision "A," sections 48:12-61 to 48:12-66, covering all crossings not involving a state highway; and it expressly makes these particular sections applicable to "*all* alterations, *reconstructions*, changes, relocations or openings" ordered by the Board after the act became effective, and before under the conditions stated, including section 48:12-62, amended by the prior section 1 of the 1947 act itself to provide for the 85%-15% ratio, between the State and the railroad, in the

division of the cost of "*such* alterations, reconstructions, changes, relocation or opening" there provided for, the pronoun "such," in contrast to "all" in section 2, referring in all seeming to the prior section 48:12-61. Unless section 2 of the 1947 act be so read, as inclusive of all such local crossings, whether at grade or not, then it can have no meaning whatever. The use of the adjective "all" in this section is in itself significant of that intent. In the narrower view taken by respondents, section 1 of the 1947 act would be sufficient in itself. The offered distinction *contra* would run counter to normal English usages and suffer the taint of false perception. There is no *casus omissus* here.

A supplement was not needed merely to implement, as counsel argue, "the section of the act specifying *when* the new division of costs is to begin"; the appropriate place for this regulation would have been section 1, amending R.S. 48:12-62, N.J.S.A., to prescribe the new ratio, or R.S. 48:12-67, N.J.S.A. This "new schedule of cost participation" plainly has reference to the enlarged ratio coverage of grade separation, improvements and reconstructions embodied in the section itself; the "effective date clause" is but an incident of the substantive provision expanding the crossing construction made subject to the new cost assessment ratio. The effective date provision governs crossing construction now, for the first time, included in the class subject to the apportionment of the attendant expense between the State and the railroad, that is to say, it is applicable to work of the enumerated class ordered by the Board *after the act became effective* and *also* work ordered before if not in part commenced on the ground prior to that day. There was no need for a like provision in relation to state highway-railroad crossings; hence, the express exclusion from the operative force of this regulation of "any grade-crossing elimination under a State Highway Commission program pursuant to" sections 48:-12-68 to 48:12-77.

And the title of the 1947 act suggests subject matter comporting with this intent. It declares the object of the measure to be the elimination of "grade *and other crossings* of railroad tracks and highways"; and it affirms a purpose to "supplement" the new ratio coverage of Chapter 12. When the words of the enacting clauses of a statute are of doubtful import (and this is not to say that such is the case here), resort may be had to the title in aid of the discovery of the legislative intent. Pancoast v. Director General of Railroads, 95 N.J.L. 428, 113 A. 256, 37 A.L.R. 917 (E. & A.1921); Paul v. Gloucester County, 50 N.J.L. 585, 589, 15 A. 272, 1 L.R.A. 86 (E. & A.1888). This, in accordance with Article IV, Section VII, paragraph 4 of the 1947 Constitution, providing that "* * * every law shall embrace but one object, and that shall be expressed in the title." By force of this provision, "the title of a statute is not only an indication of the legislative intent, but is also a limitation upon the enacting part of the law"; it "can have no effect with respect to any object that is not expressed in the title." Hendrickson v. Fries, 45 N.J.L. 555, 563 (E. & A.1883); Gibbs v. Township Committee of Northamption Township, 52 N.J.L. 496, 19 A. 975 (Sup.Ct. 1890); Dobbins v. Northampton, 50 N.J.L. 496, 14 A. 587 (Sup.Ct.1888).

It is particularly significant in this regard that the embodiment of this provision was by means of a supplement to chapter 12 by a title that included "other crossings." A supplement is in its very nature a complement or addition to the original statute. Packard v. Bergen Neck Ry. Co., 54 N.J.L. 229, 23 A. 722 (Sup.Ct.1892); Edwards v. Stein, 94 N.J.Eq. 251, 119 A. 504 (Ch.1922). "The ordinary meaning of the word 'supplement' doubtless is 'a supplying by addition of what is wanting'"; but usage has given the term a special and broader meaning. Rahway Savings Institution v. City of Rahway, 53 N.J.L. 48, 20 A. 756 (Sup.Ct.1890). "A supplemental act is one designed to improve an existing statute, by adding something thereto

without changing the original text." First State Bank of Shelby v. Bottineau County Bank, 56 Mont. 363, 185 P. 162, 8 A.L.R. 631 (Sup.Ct.1919). A supplemental act "is that which supplies a deficiency, adds to, or completes, or extends that which is already in existence, without changing or modifying the original." McCleary v. Babcock, 169 Ind. 228, 82 N.E. 453 (Sup.Ct.1907). "Supplementary" means added as a supplement; additional; being, or serving as, a supplement. Swanson v. State, 132 Neb. 82, 271 N.W. 264, 268 (Sup.Ct.1937). The term "supplemented" is frequently used "in apposition to the term 'amended' to designate the legal effect of an ordinance subsequently adopted adding to the provisions of the original ordinance without making any changes in its phraseology or effect." Lehman v. McBride, 15 Ohio St. 573 (Sup.Ct.1863); City of Cincinnati v. Hillenbrand, 103 Ohio St. 286, 133 N.E. 556 (Sup.Ct.1921); Caldwell v. Cleveland, 12 Ohio N.P.,N.S., 483, 24 Ohio Law Abst. 233 (1937). A "supplementary" or "supplemental" act is generally "an act not purporting to amend but which makes an addition to a prior statute without imparing any existing provision thereof." Sutherland's Statutory Construction, 3d ed., section 1924.

Subdivision B of chapter 12, R.S. 48:12-68 to 78, N.J.S.A., covers all state highway-railroad intersections; and, as we have seen, R.S. 48:12-68, N.J.S.A., the jurisdiction of the State Highway Commission also extended to improvements, alterations and reconstruction of crossings not at grade, and new crossings not at grade in replacement of grade crossings in the vicinity. Hence, the express limitation of section 2 of the 1947 act to secondary highway-railroad intersections, as a means of placing all highway-railroad intersections in the one category in respect of sharing the expense of grade separation improvements and reconstructions.

Section 2 of the 1947 act was given the compilation number 48:12-67.1 by the Law Revision and Bill Drafting Commission pursuant to R.S. 1:3-1, as amended by L.1941,

c. 19. Section 48:12-67 provided that sections 48:12-61 to 48:12-66 should apply to "any alterations, changes, relocations or openings" ordered by the Board prior to April 14, 1930, if no part of the work under such order had been actually commenced. There was no mention here of "reconstructions."

The Attorney-General invokes the purely interpretive doctrine that repeals by implication are not favored in the law; and, absent an express repealer, the indication of an intention to effect a repeal of prior legislation must be clear and compelling. Since the question is essentially one of legislative intent, it follows that where, as here, the later statute is manifestly intended to prescribe the exclusive governing rule, it necessarily supersedes the prior inconsistent legislation. Town of Montclair v. Stanoyevich, 6 N.J. 479, 494, 79 A.2d 288 (1951). And even where the two laws on the same subject "are not repugnant in terms, yet if the later act covers the whole subject matter, and it appears that it was intended as a substitute for the first act, it will operate as a repeal of that act." Roche v. Mayor and Council of Jersey City, 40 N.J.L. 257 (Sup.Ct.1878). To the same effect: Hartman v. Board of Chosen Freeholders, 127 N.J.L. 170, 21 A.2d 351 (Sup.Ct.1941). See also Hourigan v. North Bergen Township, 113 N.J.L. 143, 172 A. 193, 785 (E. & A.1934).

A statute is not to be given an arbitrary construction, according to the strict letter, but such as will advance the sense and meaning fairly deducible from the context. The reason and spirit of the law, *i. e.*, the motive which led to the making of it, prevails over the literal sense of terms; its obvious policy is an implied limitation of the sense of general terms and a touchstone for the expansion of narrower terms. Words are but symbols of thought and expression which of necessity take color and significance from their surroundings and the evident purpose of the law. Fischer v. Fischer, 13 N.J. 162, 98 A.2d 568 (1953). Reason is the soul of law; the reason of the law being

changed, the law is also changed. 7 Coke 7. And where the reason of the regulation is general, though the provision is special, it has a general acceptation. Wright v. Vogt, 7 N.J. 1, 80 A.2d 108 (1951). The end design of construction is to bring the operation of the statute within the apparent intention of the Legislature. Nagy v. Ford Motor Co., 6 N.J. 341, 350, 78 A.2d 709 (1951).

Neither the collocation of words and phrases of the act nor the rules of syntax should control in disregard of the evident legislative intent. Costanzo v. Tillinghast, 287 U.S. 341, 53 S.Ct. 152, 77 L.Ed. 350 (1932). The dominant consideration is the sense and meaning of the statute when read as a whole, and regard is to be had to the subject matter as well as the language. Bayonne Textile Corporation v. American Federation of Silk Workers, 116 N.J.Eq. 146, 172 A. 551, 92 A.L.R. 1450 (E. & A.1934). And to this end, it is proper to consider the history of the times and the attending circumstances when the act was adopted, including the social, economic and governmental conditions of the state or country. District of Columbia v. Murphy, 314 U.S. 441, 62 S.Ct. 303, 86 L.Ed. 329 (1941). If the intent of the Legislature cannot be gathered from the statute itself, taken as a whole, resort may be had to such extrinsic matters as the Legislature presumably had in mind at the time of the adoption of the law. In re Taft's Estate, 110 Vt. 266, 4 A.2d 634, 120 A.L.R. 1382 (Sup.Ct.1939). Chief Justice Marshall said: "Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived." United States v. Fisher, 2 Cranch 358, 2 L.Ed. 304 (1804).

The majority view is that the "role of section 2 [of the 1947 Act] was merely to spell out the effective date of the new 85-15 formula and nothing more."

But, as plaintiffs acknowledge, and quite properly so, the normal course to this end would have been the amendment of the Act itself. The argument is that the unconventional supplement served the self-same purpose, thus

ignoring the apparently discriminating use of both the amendment and the supplement in the one Act. It is fairly to be presumed, barring a clear showing *contra*, that in such context the supplement was employed in its conventional usage as a complement or addition to the original Act. Manifestly, these were not used casually as convertible terms; the frame of the Act itself denotes beyond reasonable doubt their purposive use as words of art having essentially different connotations.

And the absence of a specific appropriation is of no significance as to the legislative meaning and purpose; to hold the contrary is to beg the question. There was no current need for an appropriation to fulfill the statutory purpose. The elimination of existing grade crossings was then and still is a continuous process according to an "annual program" that requires annual appropriations. But such is not the case in the reconstruction of grade separations; the need here is not continuous but sporadic, and appropriations may be made as the intermittent need arises. It is shown that since 1930 there were but seven reconstructions of local highway-railroad crossings not at grade, and the entire cost of at least three of these projects was borne by the State's allotment of Federal funds supplied by the Works Progress Administration. And it was conceded on the oral argument that, although not wholly sufficient, the State Utility Commission was then in possession of moneys that could be devoted to this purpose, if the obligation were the State's in part, presumably undedicated funds usable for general purposes.

But however this may be, the want of an appropriation cannot be determinative of the meaning of the Act, especially in this context; if the apportionment is provided as of right, then the full burden cannot be cast upon the railroad because the State's share is now unavailable. There is quite obviously no need for an annual appropriation to this end, unlike the elimination of existing grade crossings according to an annual program; and it is but fair to as-

sume that the Legislature deemed it prudent economy to await the need from time to time irregular as it must necessarily be.

And it is purely conjectural to suppose that the insertion of the word "reconstructions" in R.S. 48:12-62, N.J.S.A. by the amendment effected by section 1 of the 1947 Act, was designed "to avoid any possible contention that the 85-15 formula would be inapplicable * * *." There had been no doubt as to the meaning of the section in all the years of its operation. The words "alterations, changes, relocation or opening" amply conveyed the sense which it is now thought was merely restated by the addition of the term "reconstructions," and this by common consent over the years; and so it is sound hypothesis that the purpose was to relate the section to an expanded coverage of the new cost-sharing formula; there is no other reasonable alternative. The suggestion of simple clarification overlooks the significance of the terms "changes" and "relocation," not to mention "opening."

The proposal here is a new bridge to replace the 1901 structure now outmoded and inadequate for the ever-increasing flow of motor vehicle traffic, generally such in character and volume as to demand new highways and expansion of the old, an apt illustration of the design of the supplement to place all crossing reconstructions and improvements to satisfy modern requirements in the one category. The need for the new overpass grew out of the necessitous conditions now obtaining.

It would seem to be a distortion of the essential reason of the legislative policy to hold that, as to secondary grade crossings, the cost of crossing separations alone is shared, even though the replacement be a substantial extension of the old construction, required in the imperative public interest to meet the great and continuing increase in the volume of traffic different in character. And on this general hypothesis, the statute in terms covers all secondary cross-

ing reconstructions, whether or not at grade. Such is the obvious principle of the legislative policy.

I am clear that the Legislature intended to deal with the problem in principle as in the Federal jurisdiction and other states; and that this intent is evident in the expression.

I would reverse and remand for judgment accordingly.

EXHIBIT B.

Opinion of the Superior Court of New Jersey, Appellate Division.

Decided March 8, 1957.

CONFORD, *J. A. D.*

The question here is whether a railroad company is entitled to 85% financial assistance by the state when ordered to reconstruct a county highway bridge over its railroad tracks. The appellant makes its affirmative contention on that proposition on the basis of *L.* 1947, *c.* 178.

On November 23, 1955 plaintiffs filed a petition with the Board of Public Utility Commissioners requesting that the defendant railroad be required to construct a new fireproof bridge to replace the existing "Deep Cut Bridge" over its right-of-way at Sayreville. The present bridge carries Washington Road, a county highway, across defendant's tracks. It was originally intended for the passage of at least two lanes of highway traffic, but the Board has found that under present-day traffic conditions the limited width of the bridge impedes public travel, buses and commercial vehicles being unable to pass one another on it. The Board therefore ordered a new and adequate bridge to be constructed by the railroad within a year from the date of the order, July 25, 1956. The present appeal raises only this issue—the correctness of the failure of the Board to assess the State for 85% of the cost of reconstruction, under the act cited. Subsidiary to the matter of construction of the 1947 act there is raised the question as to the constitutionality of existing statutes pertaining to defendant's responsibility in this matter under the assumption that the 1947 act leaves the defendant assessable for 100% of the cost without regard to whether

it benefits to any extent from the work. We think a foundation for the presentation of the subsidiary point is scarcely raised in defendant's brief or in its "statement of questions involved" therein, *R.R.* 1:7-1(c), but the question was orally argued and we will deal with it.

There is no question but that prior to the 1947 statute it was the obligation of every railroad company at its own cost and expense to construct and keep in repair "good and sufficient bridges and passages over, under and across" any railroad right-of-way, where any road, street or avenue might cross the railroad, "so that public travel on the road is not impeded thereby." (*R. S.* 48:12-49), deriving from *L.* 1903, *c.* 257. It was further provided that "said bridges and passages shall be of such width and character as shall be suitable to the locality in which they are situated." An understanding of the contention of the railroad appellant in the present case requires reference to the so-called Fielder Grade Crossing Law, *L.* 1913, *c.* 57 (*R.S.* 48:12-61 to 67), which authorizes the Board of Public Utility Commissioners to compel a railroad company to eliminate a crossing of the tracks of the railroad with a public highway at grade. The entire cost of elimination was placed on the railroad under the original enactment. By *L.* 1929, *c.* 88, a program for elimination of railroad crossings *with state highways*, both at grade and not at grade, was adopted, pursuant to which the cost of the work was to be shared equally between the state and the railroad company affected. *R.S.* 48:12-68 to 78, as amended. In 1930 the Fielder Law, above referred to, was amended (*L.* 1930, *c.* 101) to reduce the railroad obligation for the elimination of grade crossings to 50% of cost and also to indicate that it no longer applied to state highway crossings, thereby conforming it to the plan of the 1929 statute.

Thus, as of prior to 1947, elimination of crossings *at grade* with other than state highways and elimination of crossings, whether or not at grade, with state highways,

required the payment by the railroad affected of but 50% of the cost. But in the case of crossings not at grade affecting other than state highways the cost of compliance with *R.S.* 48:12-49 was borne entirely by the railroad.

Now, to consider *L.* 1947, *c.* 178 and the claim of the defendant that it operates to relieve it of 85% of the cost of reconstruction of the bridge involved in the present case. The act is entitled "An Act concerning the elimination of grade and other crossings of railroad tracks and highways, amending sections 48:12-62, 48:12-70, 48:12-71, 48:12-77 and supplementing chapter twelve of Title 48 of the Revised Statutes." Section 1 of the act amends Section 48:12-62 to provide that the railroad company involved shall pay 15% and the Public Utility Board, "out of funds to be provided for that purpose," 85% of the expense of *such* alterations, reconstructions, changes, relocation or opening . . ." (emphasis ours.) Section 2 provides that Sections 48:12-61 to 48:12-66 of the Revised Statutes "shall apply to all alterations, reconstructions," etc. "ordered by the Board of Public Utility Commissioners, after the effective date of this act" and also to any "alterations, reconstructions," etc. ordered prior to such effective date if no part of the work under such order had been actually commenced on the ground prior to such date. Sections 3, 4, and 5 of the act provide for a reduction to 15% of total costs, of the railroad's share of the cost of work to be shared by railroad companies and the State Highway Commission under *R.S.* 48:12-70, 71 and 77 (crossings with state highways).

The argument of the railroad company is that because of the reference to "and other crossings" in the title of *L.* 1947, *c.* 178 and of the insertion of the words "all" and "reconstructions" in Sections 1 and 2 of the act, verbiage not in the amended statutory sections previously, it is clearly and unambiguously indicated that the intention was that the expense allocations in the act should be applicable to all reconstructions made by a railroad company on the

order of the Public Utility Commission, whether or not the crossing was at grade and whether or not the highway affected was a state highway.

The argument is quite unsound. Insofar as Sections 1 and 2 of the 1947 act are concerned, they deal only with *R.S.* Sections 48:12-61 to 66, inclusive. Those sections are concerned solely and exclusively with elimination of crossings *at grade.* In the absence of express legislative language so requiring, it would be totally unwarranted to construe an amendment or supplement to those sections as dealing with crossings *not at grade.* Particularly when we are dealing with a statute which it is contended operates to appropriate or commit state funds should a court be insistent upon finding clear, express and unambiguous legislative direction. It does not clearly appear why the word "reconstructions" was inserted in the 1947 amendment of *R.S.* 48:12-62. The plaintiffs suggest that the interpolation was intended to bring the coverage of the statute, insofar as it applies to grade crossing eliminations, in line with Section 1 of the 1930 amendment of the Fielder act, which refers to "reconstructing such railroad" (See *R.S.* 48:12-61a). But whatever the purpose may have been, the language cannot have the effect contended for by plaintiff, for the reasons already indicated. So far as Section 2 of Chapter 178 is concerned, the obvious purpose is to fix the date or time controlling the applicability of the new schedule for cost participation to pending or new projects.

The railroad stresses the reference to "grade and other crossings" in the title of Chapter 178 as purportedly indicative of an intent that the 1947 act should apply to work at crossings other than at grade. So it does, but the simple explanation is that Chapter 178 does deal with crossings other than at grade insofar as it amends R.S. Sections 48:12-70, 71 and 77, which all deal with crossings at state highways, and, as indicated above, those provisions have to do with crossings whether or not at grade. That

is the obvious significance of the reference in the title and it does not help plaintiff.

It remains to consider the contention that if New Jersey's relevant statutes, properly construed, require the defendant to bear the entirety of the expense of this work, they impose an arbitrary, and therefore unconstitutional, requirement, in that little, if any, of the benefit of the ordered reconstruction accrues to the benefit of the railroad. However, the theory that a state must consider benefit to the railroad or absence thereof in determining what proportion of the expense of reconstruction at a crossing with a highway should be borne by the railroad was expressly rejected by the United States Supreme Court in *Atchison T. & S. F. R. Co. v. Public Utility Commission*, 346 *U.S.* 346 (1953). True, citing its previous holding in *Nashville C. & St. L. Ry. v. Walters*, 294 *U.S.* 405 (1935), the Court reiterated the rule that "such allocation of costs must be fair and reasonable" and that in such a special situation as was shown in the *Nashville* case, even a 50-50 allocation might be unfair and unconstitutional (improvement of a state highway, rather than service of local considerations of highway safety in relation to community growth). But the Court reasserted the rule that where "the improvements were instituted by the state or its subdivisions to meet local transportation needs and further safety and convenience, made necessary by the rapid growth of the communities," the entire cost of the improvement may be constitutionally imposed on the railroad (346 *U.S.* at *p.* 352). See also *N. J. Highway Authority v. Central R. Co. of N. J.*, 21 *N.J.* 157, 166 (1956); *Penna-Reading Seashore Lines v. Board of Public Utility Commissioners*, 13 *N.J. Super.* 540, 549 (*App. Div.* 1951), affirmed 8 *N.J.* 85 (1951). Such considerations apply to sustain the fairness in the constitutional sense of the allocation of the entirety of the expense of the present project to defendant. The record in the present

case indicates that the highway antedated the coming of the railroad many years ago. The railroad had hitherto needed to build only relatively inexpensive bridges to connect the separated segments of the highway which its coming to the area and consequent "deep cut" caused to be severed. The need for a larger bridge arises from normal local community growth and of consequent increase of type and volume of vehicular traffic across the bridge, much of it presumably local in character. The impelling factor is local safety, convenience and necessity. The railroad may not complain of total imposition of cost upon it in such circumstances in the exercise of the State's police power (346 *U.S.*, at *p.* 352).

We are asked by plaintiffs to adjudicate the continued force and effect of the date fixed by the Board for completion of this project, notwithstanding the pendency of this appeal. We think that matter is properly to be left to the judgment and discretion of the Board.

Affirmed.

EXHIBIT C.

Decision and Order of the Board of Public Utility Commissioners.

BY THE COMMISSION:

The Board of Chosen Freeholders of Middlesex County, the Borough of Sayreville and the City of South Amboy, New Jersey, by joint petition filed with the Board on November 23, 1955, request that The Pennsylvania Railroad Company and Public Service Coordinated Transport be required to construct a new fire proof bridge of a design and width suitable and adequate for the present day needs of the traveling public in lieu of the existing "Deep Cut Bridge" which carries Washington Road over the tracks of the Pennsylvania Railroad in the Borough of Sayreville, Middlesex County, New Jersey.

The Pennsylvania Railroad's answer filed December 14, 1955 denied that an unsafe condition existed and claimed that the structure has been maintained in a safe condition and that any inadequacy of the bridge is due to highway conditions which are beyond the responsibility of the railroad company.

The answer of Public Service Coordinated Transport filed December 14, 1955 denied that it was under legal obligation to construct a new bridge and maintained that any contributions made by a predecessor company did not consitute recognition of a joint responsibility with the railroad company in respect to said bridge.

The matter was brought before the Board in public hearing on February 8th and 23rd, March 19th and 26th, April 10th and May 21st, 1956. Upon the completion of hearings briefs were filed by all parties.

In Resolution adopted February 2, 1956 the County of Middlesex granted consent to any and all realignments of

county roads which may be necessary to permit construction of a new bridge at a proper alignment, provided that the cost of the project is borne by the defendants. It should be noted that all highways approaching "Deep Cut Bridge" are county roads.

During the course of the hearings it was developed that a highway known as Old Burlington Road was dedicated in 1705 and that a portion of it was rededicated in 1808 as Washington Road. This highway is shown on maps dated 1781 and 1827 as being straight at the location of the present "Deep Cut Bridge" over the Pennsylvania Railroad. The railroad first came into this area in 1831 and a map was introduced dated 1850 which shows the curved alignment of the road as it passes over the railroad. County records do not show that any authority was granted for changes in the road or when the changes were made. Washington Road is said to be one of the principal connections between Sayreville and South Amboy.

Records are not available to show the time of construction or the change of the first bridge over the railroad, but it would appear that the tracks were always below the level of the highway. It has been established that a timber bridge was in existence prior to 1901 and that the present bridge was built with steel girders and a steel and wood floor as the result of an agreement between the United New Jersey Railroad and Canal Company (The Pennsylvania Railroad Company) and the Middlesex and Somerset Traction Company (Public Service Coordinated Transport).

The present bridge is constructed with steel plate girders twenty feet apart and 120 feet long divided into spans of 30 feet, 60 feet and 30 feet. The structure has a wood floor and provides a clear roadway width of 18 feet. The structure was originally designed to carry 30-ton trolley cars although recently it has been posted for a maximum load of 10 tons.

Washington Road extends in a generally northeast-southwest direction and traffic coming from South Amboy turns sharply to the northwest as it enters the bridge. Traffic from Sayreville to South Amboy is required to turn sharply to the southeast in order to pass over the bridge. A highway known as Main Street which was established in 1891 extends to the northwest from the end of the bridge and intersects Washington Road a short distance northwest of the bridge. The original dedication of Washington Road calls for a highway three rods or 49.5 feet in width. This dedicated width of roadway normally calls for a paved roadway 30 feet wide which would be capable of carrying two lanes of traffic. An interchange track connecting the Pennsylvania Railroad with the Raritan River Railroad passes over the present road at grade near the South Amboy end of the bridge.

The petitioner's witnesses described the expansion of the industrial and residential areas in the vicinity of the bridge and testified that more than 3,000 vehicles use the bridge on a normal weekday between 8:00 A.M. and 10:00 P.M. Busses and commercial vehicles are unable to pass on the structure and delay to traffic results when such vehicles are required to wait until the bridge is clear. One of the principal objections to the bridge in its present condition is based on the width of the roadway and the inability of two commercial vehicles to pass. The petitioners also claim that the bridge has a limited capacity, is incapable of supporting regular highway loads and that the railroad company is responsible for the curved alignment of the roadway and should be required to construct a new bridge and new approach roads to eliminate the sharp curves and provide a modern fire proof bridge with a roadway width of 30 feet. Plans were presented to show a solution by reconstructing the bridge at a different angle and new approach roads. The estimated cost of the project was stated to be $350,000 of which $200,000 would be required to rebuild the approaches.

The railroad company contended that the bridge was maintained in proper condition to carry highway loads and that although the width of the roadway is only 18 feet the alleged hazardous condition could be corrected by construction of new approach roads at a cost of approximately $80,000. It was stated also that a new bridge in the present location with a roadway width of 30 feet could be constructed for approximately $110,000.

The obligation of the railroad company is set forth in R.S. 48:12-49, which states:

> "Every railroad company owning, leasing or controlling any right of way for a railroad within this state shall construct and keep in repair good and sufficient bridges and passages over, under and across the railroad or right of way where any road, street or avenue now or hereafter laid, shall cross the same, so that public travel on the road is not impeded thereby. Said bridges and passages shall be of such width and character as shall be suitable to the locality in which they are situated."

The broad authority of the Board in such cases has been established in *Erie Railroad Co.* v. *Board of Public Utility Commissioners*, 107 N. J. L. 409, affirmed 109 N. J. L. 264. In *City of Newark* v. *Erie Railroad Co.*, 72 N. J. Eq. 447 it is shown that the duty of the railroad is not completely performed by an original construction but is a continuing one.

The obligation of the railroad however is limited to the area within its right-of-way lines as set forth in *Hudson County* v. *Board of Public Utility Commissioners*, 123 N. J. L. 204, affirmed 124 N. J. L. 563, in which the court restricted the duty of maintenance as follows:

> " * * * The railroad obligation, we think, was confined to the repair of the passage under its right of way."

While the Board of Public Utility Commissioners under R. S. 48:12-49 may require a railroad to perform its statutory duty to construct and keep in repair good and sufficient bridges, there is no authority in this Board to require a railroad to construct any approaches. Inasmuch as all roads served by the bridge are county roads and the County of Middlesex has not made provision for the construction of approaches to the bridge in its proposed alignment, this Board is without jurisdiction to order a change in the alignment of the present bridge.

After consideration of the record the Board finds:

1. That Washington Road is a public road originally intended for the passage of at east two lanes of highway traffic.

2. That "Deep Cut Bridge" which carries Washington Road over the tracks of the railroad impedes public travel on said road in that it restricts the movement of vehicles because of the limited width of the roadway on the structure.

3. That the sharp angles or curves on the approaches to the bridge create a less desirable condition than a straight roadway.

4. That, in the present status of this case, the jurisdiction of the Board only extends to ordering the reconstruction of the brige at its present location and position to provide a clear roadway width of 30 feet which will conform with the paved width of Washington Road and enable motor vehicles to turn on to the bridge without interference.

5. That a sidewalk should be provided on one side of the bridge to accommodate pedestrian traffic.

6. That although Public Service Coordinated Transport is a public utility under the jurisdiction of the Board, the Board does not have the power to com-

pel specific performance of a contract, even when the contract is between two public utilities.

The Board therefore HEREBY DISMISSES the complaint against Public Service Coordinated Transport.

The Board ORDERS The Pennsylvania Company to reconstruct the "Deep Cut Bridge" which carries Washington Road over the tracks of the railroad in the Borough of Sayreville and to provide a modern fire proof structure with a roadway 30 feet, one sidewalk 5 feet wide, which shall be capable of carrying modern highway loads as specified by the New Jersey State Highway Department for this locality.

The Board FURTHER ORDERS The Pennsylvania Railroad Company to complete the work of reconstruction within one year from the date hereof.

Dated: July 25, 1956.

(Seal)

BOARD OF PUBLIC UTILITY COMMISSIONERS

By: (Signed) EDWARD J. HART,
President.

EXHIBIT D.

Denial of Petition for Reconsideration and Modification.

BY THE COMMISSION:

The Pennsylvania Railroad Company petitioned the Board for modification of its Decision and Order dated July 25, 1956. Subsequent to this, the Board of Chosen Freeholders of Middlesex County, the Borough of Sayreville and the City of South Amboy filed an answer to the railroad's petition and in the same pleading filed a cross-petition for reconsideration and modification. The Pennsylvania Railroad then filed a motion to dismiss the cross-petition for reconsideration and modification.

After consideration of both petitions and the answer to the petition of the railroad company, the Board is of the opinion that there are no errors of law or fact in the said Decision and Order, and

HEREBY DENIES the petitions for reconsideration and modification.

BOARD OF PUBLIC UTILITY COMMISSIONERS

By: (Signed) EDWARD J. HART
President

Dated: September 6, 1956

(Seal)

Attest:

(Signed) H. J. FLAGG
Acting Assistant Secretary

I HEREBY CERTIFY the foregoing to be a true copy of a Denial of Petition for Reconsideration and Modification issued by the Board of Public Utility Commissioners at its meeting held Thursday, September 6, 1956 and recorded in the minutes of said meeting.

s/ H. J. FLAGG
Acting Assistant Secretary

CERTIFICATE OF SERVICE.

I, Windsor F. Cousins, counsel for appellant, The Pennsylvania Railroad Company, hereby certify that on the 15th day of July, 1958, I served a copy of the foregoing Jurisdictional Statement on appellees herein, Borough of Sayreville, City of South Amboy, County of Middlesex and the Board of Public Utility Commissioners of the State of New Jersey, by depositing the same in the United States Post Office, with first class postage prepaid, addressed to counsel of record, Joseph T. Karcher, 61 Main Street, Sayreville, New Jersey, John E. Mullane, 116 N. Broadway, South Amboy, New Jersey, Samuel V. Convery, 175 Smith Street, Perth Amboy, New Jersey, David D. Furman, Attorney General, and Howard T. Rosen, Deputy Attorney General, State House Annex, Trenton, New Jersey.

WINDSOR F. COUSINS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 179

THE PENNSYLVANIA RAILROAD COMPANY,

Appellant,

vs.

BOROUGH OF SAYREVILLE, *et al.*,

Appellees.

ON APPEAL FROM JUDGMENT OF THE SUPREME COURT OF NEW JERSEY

MOTION TO AFFIRM THE JUDGMENT OF THE SUPREME COURT OF NEW JERSEY

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TABLE OF CONTENTS

	PAGE
MOTION TO AFFIRM	1
STATEMENT OF THE CASE	1
ARGUMENT—The judgment of the New Jersey Supreme Court presents no constitutional question of substance warranting further argument in this court	4
CONCLUSION	8

Cases Cited

Atchison, Topeka & S. F. R. Co. v. P. U. C., 346 U. S. 346, 74 S. Ct. 92, 98 L. Ed. 51 (1953)	5
Chicago M. & St. P. Ry. Co. v. Minneapolis, 232 U. S. 430, 34 S. Ct. 400, 58 L. Ed. 671 (1914)	5
Erie R. R. Co. v. Bd. of Pub. Utility Commrs., 254 U. S. 394, 41 S. Ct. 169, 65 L. Ed. 322 (1921)	5
Nashville, C. & St. L. Ry. v. Walters, 294 U. S. 405, 55 S. Ct. 486, 79 L. Ed. 949 (1935)	5–7

Statutes Cited

N.J S. 27:12B-6	7
N.J.S. 27:23-7	7
N.J.S. 48:12-49	7
N.J.S. 48:12-62	7
N.J.S. 48:12-70	7
28 U.S.C. 1257(2)	2

Rule Cited

Rule 16, par. 1(c), Revised Rules of the Supreme Court of the United States	1

IN THE

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No.

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Appellees.

ON APPEAL FROM JUDGMENT OF THE SUPREME COURT OF NEW JERSEY

Motion to Affirm

Pursuant to Rule 16, par. 1(c), of the Revised Rules of this Court the Appellees move that the judgment of the New Jersey Supreme Court be affirmed on the ground that the questions raised by the appellant are so insubstantial as not to warrant further argument.

Statement of the Case

The Borough of Sayreville, the City of South Amboy, and the County of Middlesex petitioned the New Jersey Board of Public Utility Commissioners for an order directing the Pennsylvania Railroad Company to construct a new fireproof bridge in place of the existing "Deep Cut Bridge"

which carries Washington Road over the tracks of the Pennsylvania Railroad in the Borough of Sayreville. After a hearing, the Board directed the Railroad to reconstruct the Deep Cut Bridge so as to provide a modern fireproof structure capable of carrying modern highway loads (JS 32a, JS 37a). The Railroad accepted the order that required it to reconstruct the bridge but appealed to the Superior Court of New Jersey, Appellate Division, on the ground that the Railroad was entitled by law to have the State of New Jersey contribute 85% of the cost of the new structure. The Appellate Division rejected this contention and affirmed the order of the Board (JS 26a). The Railroad then appealed to the Supreme Court of New Jersey which affirmed the judgment of the Appellate Division (JS 1a). The appeal to this Court was taken from the New Jersey Supreme Court as of right under the provisions of 28 U.S.C. 1257(2).

The story begins well before the Revolutionary War with the Old Burlington Road, a back-country route used by early settlers of Central New Jersey. The portion of this road involved here was rededicated in the early nineteenth century as Washington Road, the name by which it is known today. Although the precise date when the first Deep Cut Bridge was built is unknown it was presumably around 1831 when the railroad was constructed. The bridge was needed to cross the "deep cut" dug under Washington Road so that the trains could avoid the inconvenience and danger of a highway crossing at grade. Washington Road was originally straight at the bridge location but its alignment was sharply curved around the time that the railroad and the first Deep Cut Bridge were constructed. In 1901 the Railroad built a new Deep Cut Bridge which is in use at the present time.

There have been many changes in the surrounding area since 1901. Today three county highways converge on the

Deep Cut Bridge. Washington Road, one of them, now is the principal connecting link between South Amboy and Sayreville and has a dedicated width of 49½ feet which narrows to about 18 feet for the bridge. Sayreville, with 19,000 people, has almost doubled its population since 1950. South Amboy contains 10,000 people. Reliable estimates predict that the Middlesex County population as a whole will double in the next twenty years. In recent years industrial activity has doubled and many large factories are located in Sayreville. Estimates of the amount of cars that use the bridge vary from approximately 1,300 to 3,000 daily.

The bridge that met the needs of 1901 will not permit two buses to pass abreast today. Modern standards require a two-lane bridge to be twenty-six feet wide in contrast to the 17 feet 11 inches clearance of the Deep Cut Bridge. There have been minor accidents as a result of the narrowness and fire engines are not permitted to cross the bridge. Its metal sides obstruct the view of people approaching it. It simply cannot handle its traffic load today. In addition, the sharp curves of the bridge approaches impede the vision of motorists and slow down the flow of traffic. The Railroad has posted signs on the bridge limiting speed of six miles per hour; although the speed limit on the county highways is twenty-five miles per hour. The same signs forbid any vehicle weighing more than ten tons with its load to cross the bridge. This excluded some 23% of the commercial traffic in New Jersey.

At present there is no paint or protective covering on the steel portions of the bridge and they have corroded. The rivet heads have become badly pitted. Vital sections of the bridge have been damaged by collisions. The steel produced in 1901 when the bridge was built was inferior to present-day quality and there is reason to suspect "fatigue" in the bridge itself. The compression flanges are badly damaged. It can only carry a ten ton load. Testimony by

a railroad expert that the bridge has a greater load capacity is rebutted completely by the fact that the Railroad itself posted signs on the bridge limiting loads to 10 tons. As a result of these many factors, the safety of the bridge was called into serious question.

The Railroad does not attack the conclusion of the New Jersey Supreme Court that, "The improvement here involved is necessary to meet local transportation needs reflecting the growth of the community" (JS 1a).

ARGUMENT

The judgment of the New Jersey Supreme Court presents no constitutional question of substance warranting further argument in this court.

Initially, it should be observed that the Railroad failed to raise its constitutional issue at a timely point in these proceedings. The constitutional question was not argued before the Board of Public Utility Commissioners. The Appellate Division of the New Jersey Superior Court observed:

> "We think a foundation for the presentation of the (constitutional) point is scarcely raised in defendant's brief or in its 'statement of questions involved' therein, R.R. 1:7-1(e), but the question was orally argued and we will deal with it" (JS 27a)

The New Jersey Supreme Court observed that the Railroad was shifting its constitutional issue from the argument it presented to the Appellate Division (JS 2a). Under these circumstances, it is submitted that the constitutional challenge raised by the Railroad should not be considered in this Court. Familiar principles of orderly procedure indicate that a constitutional challenge must be interposed at the first opportunity.

The Deep Cut Bridge was built originally because the Railroad decided to cross the Washington Road and wished to avoid a crossing at grade. It was built by the Railroad for the convenience of the Railroad. Designed for a sparsely settled rural area, it can not accommodate its present traffic load because of the growth of local community. Although it met the standards of its day when built, today it threatens the safety of its users.

This Court has held on numberous occasions that a State can constitutionally compel a railroad at its own expense to construct a crossing bridge under these circumstances. *Atchison, Topeka & S. F. R. Co.* v. *P. U. C.* 346 U. S. 346, 352, 74 S. Ct. 92, 96, 98 L. Ed. 51 (1953); *Erie R. R. Co.* v. *Bd. of Pub. Utility Commrs.*, 254 U. S. 394, 41 S. Ct. 169, 65 L. Ed. 322 (1921); *Chicago M. & St. P. Ry. Co.* v. *Minneapolis*, 232 U. S. 430, 34 S. Ct. 400, 58 L. Ed. 671 (1914). In the *Atchison* case, the improvements were instituted to meet local transportation needs and further safety and convenience made necessary by rapid growth in the area. These circumstances are exactly as we find them in the present case. The Court said:

> "In such circumstances this Court has consistently held that in the exercise of the police power the costs of such improvements may be allocated all to the railroad." *Atchison, Topeka & S. F. R. Co.* v. *P. U. C.*, *supra*, 346 U. S. at 352, 74 S. Ct. at 96.

Nor does *Nashville, C. & St. L. Ry.* v. *Walters*, 294, U. S. 405, 55 S. Ct. 486, 79 L. Ed. 949 (1935) indicate otherwise. Appellant contends that this case holds that a statute which requires a railroad to pay the same percentage of crossing costs under all circumstances is unconstitutional on its face. The case does not so hold. *Nashville* held that the proper test of constitutionality is

whether the statute is arbitrary and unreasonable as applied to the facts of the particular case. In *Nashville* the Court recognized that it was reasonable to lay the entire crossing costs on the railroad where—as in the present case—the expense "was an incident of the growth or development of the municipality in which it was located." *Nashville, C. & St. L. Ry.* v. *Walters, supra* 294 U. S. at 430, 55 S. Ct. at 495. The unusual circumstance in Nashville that prompted a finding of arbitrariness was that the new grade crossing there involved was not needed by the rural Tennessee community where it was located; the need to build a new crossing arose solely from the construction of a State superhighway with federal funds to link Nashville and Memphis, which was to serve as a link in a national highway system designed for use by motor carriers, competitors of the railroads. The United States Supreme Court held that the Tennessee Supreme Court was arbitrary in refusing under these circumstances even to consider whether the local statute was fair and reasonable. The Tennessee law was not overturned; the court simply remanded the case to the Tennessee Supreme Court so that it might consider whether the application of the statute was arbitrary as applied to the particular facts presented.

The New Jersey Supreme Court in the present case did exactly what this honorable Court directed should be done in the *Nashville* case. The majority opinion carefully considered whether the statute is reasonable as applied to the particular facts presented. The Court held:

> "The Legislature cannot always anticipate the constitutional formula which may be judicially devised and perhaps revised with changing circumstances. There is no reason to insist upon perfect anticipation. If a statute is reasonably appropriate in its overall approach, it should be upheld notwithstanding it may

> be invalid in special circumstances, when it is apparent that the Legislature would want the act to prevail where constitutionally it may. Such surely is the case here. In Nashville it was observed with respect to the very area here involved that 'A statute valid as to one set of facts may be invalid as to another' (294 U. S., at page 415, 55 S. Ct. at page 488). Since appellant does not claim, and surely has not demonstrated, that the act is invalid in its application to the facts of this case, the constitutional challenge must fail." (JS 2a, 3a)

The contention that New Jersey has an inflexible apportionment rule in all cases for all circumstances is patently untrue; the cost that the Railroad bears varies depending upon whether the Garden State Parkway (N.J.S. 27:12B-6), New Jersey Turnpike (N.J.S. 27:23-7), other state highway (N.J.S. 48:12-70), or local road is involved; it also depends upon whether the elimination of a grade crossing (N.J.S. 48:12-62) or reconstruction of a crossing other than at grade (N.J.S. 48:12-49) is being considered. In New Jersey the determination of a fair and reasonable apportionment under differing circumstances has been made by the Legislature rather than delegated to the discretion of the Board of Public Utility Commissioners.

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IN THE

Supreme Court of the United States

October Term, 1958.

No. 179.

THE PENNSYLVANIA RAILROAD COMPANY,
Appellant,

v.

BOROUGH OF SAYREVILLE, ET AL.,
Appellees.

On Appeal From the Supreme Court of New Jersey.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO AFFIRM.

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September 4, 1958.

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TABLE OF CASES CITED.

	Page
Atchison R. Co. v. Public Utility Commission, 346 U. S. 346	2, 3
Charleston Assn. v. Alderson, 324 U. S. 182	1
Nashville, C. & St. L. Ry. v. Walters, 294 U. S. 405	2
Sayreville v. Pennsylvania R. R. Co., 26 N. J. 197, 139 A. (2d) 97	1
Sayreville v. Pennsylvania R. R. Co., 44 N. J. Super. 172, 129 A. (2d) 895	2
Wilson v. Cook, 327 U. S. 474	1

IN THE

Supreme Court of the United States.

October Term, 1958.

No. 179.

THE PENNSYLVANIA RAILROAD COMPANY,
Appellant,

v.

BOROUGH OF SAYREVILLE, ET AL.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO AFFIRM.

1. The constitutional question presented in this appeal was squarely raised below by appellant and decided by the New Jersey Supreme Court. *Sayreville v. Pennsylvania R. R. Co.*, 26 N. J. 197, 139 A. (2d) 97. Jurisdictional Statement, Exhibit A, pp. 1a-2a. Thus this Court has jurisdiction. *Charleston Assn. v. Alderson,* 324 U. S. 182, 185-6; *Wilson v. Cook,* 327 U. S. 474, 480.

It is unnecessary to inquire, as appellees suggest, whether the question was raised at an earlier stage in the litigation. As this Court said in *Charleston Assn. v. Alderson, supra*, pp. 185-6:

> "Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal. For we need not inquire how and when the question of the validity of the statute was raised when such question appears to have been actually considered and decided by that court."

Nevertheless, the question was also decided by the New Jersey Superior Court, Appellate Division. *Sayreville v. Pennsylvania R. R. Co.*, 44 N. J. Super. 17? 129 A. (2d) 895. See Jurisdictional Statement, Exhibit B, p. 30a. Although commenting that the constitutional question was subsidiary to the issue of statutory construction and that "a foundation for the presentation of the subsidiary point is scarcely raised in defendant's brief", the Court stated that "the question was orally argued and we will deal with it." Jurisdictional Statement, Exhibit B, pp. 26a-27a.

The constitutional question was necessarily subsidiary because the Public Utility Commission declined to construe the statute asserted by the appellant to be applicable, and denied without opinion appellant's petition for clarification of its order. Jurisdictional Statement, Exhibit D, p. 38a. The Superior Court construed the statute adverse to appellant's contention and held that, so construed, the New Jersey law was not repugnant to the Constitution.

Appellant did not shift its position in the New Jersey courts, and the New Jersey Supreme Court did not state that appellant had shifted its position, as alleged in the Motion to Affirm, p. 4. Appellant's position in both courts below was the same as now presented in this Court, to wit, that a statute which imposes the cost of crossing improvements on a railroad as a fixed rule, precluding any determination of what is fair and reasonable, is arbitrary and unconstitutional. Both opinions below discussed the cases cited by appellant in support of this position, *Nashville, C. & St. L. Ry. v. Walters*, 294 U. S. 405; *Atchison R. Co. v. Public Utility Commission*, 346 U. S. 346.

2. Although the Motion to Affirm contains unsubstantiated factual statements, e.g., that the bridge was built originally by the Railroad for its own convenience and that it had become unsafe, the Public Utility Commission made no such findings and this appeal presents no factual controversy. Appellant has accepted the findings of the Com-

mission and does not ask the Court to go back of the Commission's decision and to review the evidence. Likewise, appellees are not free to make a better case for the imposition of costs on the Railroad than that contained in the Commission's order. The Commission's finding and order requiring a new bridge were based solely on matters affecting the convenience of highway travel, and having no relation to safety from railroad operation. For example, the Commission held that a wider bridge would counteract the difficulties caused by curved approaches for which the railroads have no responsibility. Jurisdictional Statement, p. 36a. It is against these findings that the statute must be viewed to determine its validity.

3. Appellant does not deny that a State can constitutionally place the entire cost of a crossing improvement on a railroad, but it contends that this cannot be done arbitrarily and with no opportunity for the consideration of the reasonableness of such a requirement. In the *Atchison* case, upon which appellees rely, and in which a cost allocation by the California Commission was upheld, this Court said that "such allocation of costs must be fair and reasonable". The New Jersey statute, as now construed, permits no determination by the State Commission of cost allocation but automatically places the entire cost on the railroad, regardless of circumstances. If the Commission finds that the improvement is necessary, it has no alternative but to charge the full cost to the railroad. Appellant submits that a substantial question of due process is presented by this situation.

4. Appellees' suggestion that a fair and reasonable apportionment under differing circumstances has been made by the Legislature, in virtue of several statutes applicable to various types of highways, is specious, as the statute involved in this appeal fits into no pattern of regulation. The statute applied is a law enacted in 1903, which would still govern all crossing improvements in New Jersey, if

it had not been almost entirely superseded by the more recent laws cited by appellees. Although in numerous situations the railroad has been wholly or substantially relieved from the cost of crossing improvements, the New Jersey Supreme Court held, contrary to appellant's contention, that the old statute has been left untouched with respect to one class of crossing improvements, i.e., the reconstruction of crossings which are subject to Commission jurisdiction. The paradoxical effect of this ruling is that while a railroad no longer has the major burden for eliminating a crossing which may endanger highway travel, it has full responsibility when the danger has been removed for reconstructing the crossing to meet changing highway conditions.

The fixed and arbitrary rule embodied in the statute may have been fair in 1903 when the railroad was the primary source of danger, but it permits no consideration of the revolutionary changes in highway transportation that have since occurred. Appellant submits that it does not meet constitutional requirements on its face or as applied to the facts in this case.

For the reasons stated in the Jurisdictional Statement, the question presented by this appeal is substantial, and it is respectfully submitted that probable jurisdiction should be noted.

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September 4, 1958.

CERTIFICATE OF SERVICE.

I, Windsor F. Cousins, counsel for appellant, hereby certify that on September 3, 1958, I served a copy of the foregoing Brief on appellees, by depositing the same in the United States Post Office, with first class postage prepaid, addressed to counsel of record, David D. Furman, Attorney General, State House Annex, Trenton, New Jersey, Howard T. Rosen, Deputy Attorney General, 1100 Raymond Boulevard, Newark 2, New Jersey, Joseph T. Karcher, 61 Main Street, Sayreville, New Jersey, John E. Mullane, 116 N. Broadway, South Amboy, New Jersey, and Samuel V. Convery, 175 Smith Street, Perth Amboy, New Jersey.

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